80-261

Supreme Court, U. S.
FILED
AUG 19 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

No. _____

ALFRED W. LA ROCHELLE AND ESTELLE JEAN LA ROCHELLE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether serious bodily harm, including murder, to resident patients at Veterans Administration hospitals located in urban areas including the one located at Long Beach, California, is reasonably foreseeable as a matter of law where inadequate or no steps are take to safeguard patients and secure the hospital from would-be assailants and where detailed procedures and regulations for such safeguarding and security, including provision for hospital police departments, exist but are not implemented in full or large part by the management and staff of the Veterans Adminstration and, in particular, the Veterans Administration Hospital in Long Beach.

2.Whether federal hospitals should be under a duty to exercise a high degree of care to prevent a patient/guest within his/her hospital quarters from being assaulted by a stranger.

3. Whether federal hospitals should be under a duty to provide patients with reasonable protection from criminal intruders.

4. Whether federal hospitals should be held to have reasonably foreseen criminal acts when detailed and comprehensive security provisions and regulations are promulgated for the specific purpose of protecting federal hospitals, staff, and patients from criminal acts.

PARTIES

In the United States Court of Appeals for the Ninth Circuit, the parties were: Alfred W. LaRochelle and Estelle Jean LaRochelle, Appellants, and United States of America, Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

ALFRED W. LA ROCHELLE AND ESTELLE JEAN LA ROCHELLE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Alfred W. La Rochelle and Estelle Jean La Rochelle, the petitioners herein, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 7, 1980, with rehearing denied and the denial entered on May 21, 1980.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 7, 1980. Petitioners Petition for Rehearing was denied by an order entered on May 21, 1980.

The jurisdiction of this Court is involked pursuant to 28 U.S.C. §1254(1).

STATUTORY and REGULATORY PROVISIONS INVOLVED

This case involves the following, all of which are set forth verbatim in the appendix hereto:

38 U.S.C. § 218

38 C.F.R. §1.218(a) and (b)

Regulations of the Veterans' Administration, DM&S Supplement, MP-1, Part I, Chapter 2, Change 29 (August 1, 1972), a/k/a "VA Hospital Police Guide"

—§B.11a(2)
—§B.11c(2)
—§B.12a(5), (7), (9)
—§B.12c(1), (2)
—§B.12d(4)

STATEMENT OF THE CASE

Petitioners brought a wrongful death action under the Federal Tort Claims Act, 28 U.S.C. §1346(b), in the United States District Court for the Central District of California, after their son had been murdered in the early morning hours in his hospital bed while a patient at the Veterans Administration Hospital in Long Beach, California.

The killer, Coyne, entered the hospital with the intent to murder La Rochelle. Coyne had never visited the hospital before and had never before threatened any of its patients. He had given no warning to anyone at or associated with the hospital of his mission.

The murderer had entered the hospital completely unchallenged about 6 a.m., and proceeded directly to the decedent's room, the location of which he had discovered by earlier telephone inquiry of the hospital staff.

There was only minimal security at the time of the murder: the entry doors to the hospital were unlocked and unguarded, and only three police officers were on duty for the entire complex, one of the largest in the Veterans Administration system (some 2,000 beds, 97 acres of grounds, and seven or eight buildings). The security provisions existing at the time were far below those required by the hospital and Veterans Administration regulations, attached hereto as Appendix C, for the protection of patients, visitors and federal property.

The victim was a patient at the Veterans Administration Hospital, and within his unlocked and open bedroom which he shared with a number of other patients. He had no prior warning that Coyne intended to attack him.

ARGUMENT SUPPORTING ISSUANCE OF WRIT OF CERTIORARI

The District Court found that the injury to the decedent was not a foreseeable event, and the Court of Appeals affirmed that finding.

Petitioners believe that the record and evidence do not support the finding that the injury was unforeseeable to a reasonable person under California law, and that if such was unforeseeable, then existing law should be broadened in the following ways to encompass the situation which occurred here:

1. Federal hospitals should be under a duty to exercise a high degree of care to prevent a patient/guest within his/her quarters from being assaulted by a stranger, as exists in the case of the duty between innkeepers and guests, the common carrier and passengers, and the school or camp and students or camper.

2. Federal hospitals should be under a duty to provide patients with reasonable protection from criminal intruders.

3.Federal hospitals should be held to have reasonably foreseen criminal acts when detailed and comprehensive security regulations are promulgated for the protection of hospitals and patients from criminal acts.

There is a great need for guidance by the Court in this area because existing state and federal law, at least as interpreted in this case thus far, appears to be unclear on the extent of the duty of hospitals to protect patients in their charge in the light of the realities of modern urban life, and because existing law respecting similar relationships (innkeeper-guest, common carrier-passenger, school-student, camp-camper) indicates an inclination by society and the law to impose a higher duty where the special relationship implies the provision of special precautions by the custodian for its charges' protection.

Existing law, at least as interpreted in this case by the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit, seems to only bind hospitals to a general duty of protection and this duty appears to not presently extend to protection from criminal assaults by persons other than, perhaps, other patients or staff of the hospital.

Yet the hospital patient is in the peculiar circumstance of being placed in the voluntary or forced custody of the hospital, which seems to be the same case with, and the primary motivation for the imposition of a higher duty upon, other custodians (such as the common carrier, the innkeeper, the school, and the camp) of persons.

Despite the commonality of the hospital patient/guest circumstance with that of the hotel guest and the common carrier passenger, the hospital patient is in even more helpless peril because he/she cannot even take minimal steps to protect against criminal acts: hospital rooms are unlocked, personal property cannot be readily concealed from others, and the patient is often incapacitated by illness, medication or injury.

For these reasons, it seems appropriate that the Court at this time consider and settle the question of the extent of hospital liability to patients for criminal acts committed upon them and permit petitioners to argue the merits of their viewpoint.

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted herein.

Dated: August 18, 1980

LOUIS M. NIVEN
A Professional Law Corporation

LOUIS M. NIVEN
Attorney for Petitioners

APPENDIX A-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED W. LaROCHELLE and ESTELLE JEAN LaROCHELLE,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

FILED
APR 7 1980
RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

No. 78-2507

[D.C. No. CV 76-1979-DWW]

MEMORANDUM

Appeal from the United States District Court
for the Central District of California

Before: PECK,* ANDERSON, and NELSON, Circuit Judges

Plaintiffs brought this action for wrongful death under the Federal Tort Claims Act, 28 U.S.C. §1346(b), after their son

*Honorable John W. Peck, Senior United States Circuit Judge, Sixth Circuit sitting by designation.

had been murdered while he had been a patient at the Veterans Administration Hospital in Long Beach, California. Defendant moved for a directed verdict after plaintiffs had presented their case. Before ruling, the District Court requested the parties to file memoranda on the duty of the Government to protect patients in Veterans Hospitals from unanticipated dangers. After considering the memoranda filed by each side, the District Court entered an order dismissing plaintiffs' action.

Under the Federal Tort Claims Act, the Government is liable for torts committed by a Veterans Hospital to the same extent as a private hospital would be under like circumstances. 28 U.S.C. §2674. Under California law, a private hospital would only be responsible for the death of a patient if it had failed to guard against dangers that were reasonably foreseeable. **Wood v. Samaritan Institution, Inc.**, 26 Cal. 2d 847, 852 (1945) ("[A] private hospital is not an insurer of a patient's safety, and the rules as to care required are limited by the rule that no one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen.").

Whether the Government is to be held liable in this case turns on the factual question of whether the Veterans Hospital failed to guard against reasonably foreseeable dangers. The record supports the District Court's finding that there was no such failure. There was no evidence of any earlier intrusion into the hospital that caused injury or death to any patient. In this

case, Coyne, the killer of LaRochelle, had discovered that his wife was having an affair with him, and entered the hospital with the intent to murder him. Coyne had never visited the hospital before and had never threatened any of its patients. No circumstances gave warning to others of his mission. The tragedy might not have been averted even if an officer had been stationed at every entrance to the building, because there was nothing about the conduct or appearance of Coyne that made him seem suspicious. He had his gun concealed on his person, and was in no way distinguishable from arriving employees, outpatients, and other visitors who had free access to the building.

Because the factual finding of the District Court is supported by the record and because it is far from being clearly erroneous, the District Court's order is

AFFIRMED.

RECEIVED
MAY 23 1980

APPENDIX A-2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED W. LaROCHELLE and ESTELLE JEAN LaROCHELLE, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	FILED MAY 21 1980 RICHARD H. DEANE CLERK U.S. COURT OF APPEALS No. 78-2507 DC# CV 76-1979-DWW ORDER

Appeal from the United States District Court
for the Central District of California

Before: PECK,* ANDERSON, and NELSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Anderson and Nelson have voted to reject the suggestion for rehearing en banc.

*Honorable John W. Peck, Senior United States Circuit Judge, Sixth Circuit, sitting by designation.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

RECEIVED
MAY 17 1978
FILED
MAY 11 1978
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
MAY 11 1978
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED W. LaROCHELLE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. CV 76-1979-DWW

ORDER OF DISMISSAL

This wrongful death action is brought under the Federal Torts [sic] Claims Act, 28 U.S.C. 1346(b), by the parents of William LaRochelle, who was murdered while a patient in the Veterans Administration Hospital at Long Beach, California. After presentation of the plaintiff's [sic] case in a nonjury trial, the government moved for a dismissal upon

the grounds that no liability or cause of action had been proved. The Court called for the preparation of points and authorities, and after considering memoranda filed by each side, now concludes that the motion must be granted.

A few days prior to the murder, the decedent was given permission to leave the hospital for three days to visit his ailing father. During this time, it is believed that he engaged in a romantic interlude with the wife of one Harold Coyne, and this fact came to the attention of the husband. About midnight of September 3, 1974, the distraught Coyne spent half-an-hour in a bar, where he had one drink, and then went to his home and had another drink. At about 3 A.M. he armed himself and went to the beach, contemplating suicide. He changed his mind and put the gun in his pocket and went to the hospital. He testified that he had never been in the hospital before, and that he knew LaRochelle's room number by getting it out of a notebook his wife owned. His testimony was that he did not intend to kill LaRochelle, but only "talk things over with him." Because of facts that I shall hereinafter recite, the Court disbelieves this professed innocent intent on the part of Coyne.

The Veterans Hospital is one of the largest among similar government facilities, having 2000 beds within 7 or 8 buildings on 97 acres. It has a police force consisting of 20 men (now 24) and there are three working shifts. The graveyard shift is from approximately 6 A.M. to 3:30 P.M.*

*This appears to be an inadvertant error by the trial court as the record indicates the graveyard shift was 12 A.M. to 8 A.M.

Regular visiting hours to patients in the hospital are from 11 A.M. to 8 P.M..

Coyne arrived at the hospital at approximately 6:30 A.M. and entered the main entrance of the unit that housed his intended victim. That entrance-way is kept locked from about 11 P.M. to 5 A.M., but is then unlocked so as to permit entry by incoming employees, early arriving outpatients and visitors who are allowed to see seriously ill patients at off-hours. A large number of persons are usually entering the building through this entrance at about the hour Coyne arrived, and he found no difficulty in making an unhindered entrance. He testified that he entered the lobby, saw a group of people "milling around," walked 200 feet to the elevator which took him to the 8th floor. When he exited the elevator, he saw no employee or other person in the hallway and walked directly to room 855, where LaRochelle was a patient. Seven or eight other patients were usually kept in LaRochelle's room, but a few minutes before the tragedy, all had left except one other, a Mr. Pamilton. Coyne walked the distance of three beds to where LaRochelle was sitting, and called out to him to get his attention. He then immediately fired two shots into his victim. A nurse who was in a nearby room ran to the door of room 855 and testified that she saw Coyne firing four more shots at someone lying on the floor. Coyne surrendered, and gave up his gun. He testified that he was in the room a maximum of 90 seconds before the first shot was fired. He testified that seconds after he entered the room and before the first shot was fired, he heard a nurse's voice behind him telling the two

occupants to get ready for breakfast. Neither side has produced such a nurse as a witness but the plaintiff argues that there was negligence on the part of such nurse for not inquiring of Coyne as to his presence in the room. If such a nurse had, in fact, appeared briefly at the door at the time it is said she did, there is nothing she could have done to have prevented this tragedy, because she would have been facing an armed man bent upon promptly accomplishing his murderous purpose. Mr. Pamilton, the other patient, testified to the sudden entry of Coyne into the room, and of his almost immediate commencement of firing his gun.

Plaintiff [sic] argues that there was an inadequate number of security or police officers on duty, and that there was no person posted at the main entrance-way of the building to inquire into the business of persons entering. Three officers were on duty during these early morning hours, and they were patrolling parking lots or keeping an eye over the nearby emergency unit where frequent problems occur. This tragedy would not have been averted even if an officer had been stationed at the entrance to the building, because there was nothing about the conduct or appearance of Coyne to give probable cause to stop him. He had his gun concealed on his person, and was in no way distinguishable from arriving employees, outpatients and other visitors who had free access to the building.

In **Wood v. Samaritan Institution, Inc.**, 26 Cal. 2d 847, 851 (1945) the Court stated:

> "The extent and character of care that a hospital owes its patients depends on the circumstances of each particular case. A private hospital owes its patients the

duty of protection, and must exercise such reasonable care toward a patient as his known condition may inquire[sic]. The measure of duty of a hospital is to exercise that degree of care, skill and diligence used in hospitals generally in that community, and required by the express or implied contract of the undertaking, a hospital is liable for want of ordinary care, whether from incompetency of a nurse, or failure in duty by a fully qualified nurse... The duty of care imposed on a hospital extends to safeguarding the patient from dangers due to mental incapacity... On the other hand, a private hospital is not an insurer of a patient's safety, and the rules as to care required, are limited by the rule that one is required to guard against, or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen." Cited from 41 Corpus Juris Secundum, 349, §8(3).

The testimony in the case at bar was that Coyne had never visited the hospital before, and had not posed an earlier threat of any kind to LaRochelle. Further, there was no evidence of any earlier similar intrusion of that kind into the hospital which caused an injury or death to any other patient. The entry of Coyne for the purpose of murdering LaRochelle was premeditated on his part, and there were no circumstances present that gave warning to others of his mission.

The motion is granted, and the cause is ordered dismissed.

DATED: This 11th day of May, 1978.

ss DAVID W. WILLIAMS
United States District Judge

APPENDIX C-1

§ 218. Standards of conduct and arrests for crimes at hospitals, domiciliaries, cemeteries, and other Veterans' Administration reservations

(a) For the purpose of maintaining law and order and of protecting persons and property on lands (including cemeteries) and in buildings under the jurisdiction of the Veterans' Administration (and not under the control of the Administrator of General Services), the Administrator or any officer or employee of the Veterans' Administration duly authorized by him may—

(1) make all needful rules and regulations for the governing of the property under his charge and control, and annex to such rules and regulations such reasonable penalties within the limits prescribed in subsection (b) of this section as will insure their enforcement. Such rules and regulations shall be posted in a conspicuous place on such property;

(2) designate officers and employees of the Veterans' Administration to act as special policemen on such property and, if the Administrator deems it economical and in the public interest, with the concurrence of the head of the agency concerned, utilize the facilities and services of existing Federal law-enforcement agencies, and, with the consent of any State or local

agency, utilize the facilities and services of such State or local law-enforcement agencies; and

(3) empower officers or employees of the Veterans' Administration who have been duly authorized to perform investigative functions to act as special investigators and to carry firearms, whether on Federal property or in travel status. Such special investigators shall have, while on real property under the charge and control of the Veterans' Administration, the power to enforce Federal laws for the protection of persons and property and the power to enforce rules and regulations issued under subsection (a)(1) of this section. Any such special investigator may make an arrest with or without a warrant for any offense committed upon such property in his presence or if he has reasonable ground to believe (A) the offense constitutes a felony under the laws of the United States, and (B) that the person to be arrested is guilty of that offense.

(b) Whoever shall violate any rule or regulation issued pursuant to subsection (a)(1) of this section shall be fined not more than $50 or imprisoned not more than thirty days or both.

38 U.S.C. §218

APPENDIX C-2

§ 1.218 Authority, applicability, and responsibility.

Pursuant to 38 U.S.C. 218, the following rules and regulations apply to all property under the charge and control of the Veterans' Administration (and not under the charge and control of the General Services Administration) and to all persons entering in or on such property. The head of the facility is charged with the responsibility for the enforcement of the rules and regulations and he shall cause these rules and regulations to be posted in a conspicuous place on the property.

(a) *Closing property to public.* The head of the facility, or his designee shall establish visiting hours for the convenience of the public and shall establish specific hours for the transaction of business with the public. The property shall be closed to the public during other than the hours so established. In emergency situations, the property shall be closed to the public when reasonably necessary to ensure the orderly conduct of Government business. The decision to close a property during an emergency shall be made by the head of the facility or his designee. The head of the facility or his designee shall have authority to designate areas within a facility as closed to the public.

(b) *Recording presence.* Admission to property during periods when such property is closed to the public will be limited to persons authorized by the head of the facility or his designee. Such perosns may be required to sign a register and/or display identification documents when requested to do so by the hospital police, or other authorized individual. No person, without authorization,

shall enter upon or remain on such property while the property is closed. Failure to leave such premises by unauthorized persons shall constitute an offense under this paragraph.

38 C.F.R. §1.218(a) and (b)

APPENDIX C-3

(2) The basic concept of security at DM&S stations is to prevent crime. VA stations are located on Federal property under exclusive, concurrent proprietorial or partial jurisdiction. Regardless of the type of Federal jurisdiction, local police forces normally do not patrol VA stations and cannot provide a continuous presence which is the utmost deterrent to criminal action. Nevertheless, all stations are highly vulnerable to a wide range of criminal acts. Each station houses patients who possess money or personal belongings. Visitors, physicians, nurses and other employees are also potential victims for criminal attack. These stations also house valuable equipment, daily transaction funds, drugs, precious metals and other supplies which are attractive to thieves and robbers. Therefore, the Director is responsible for providing persons on Federal property the same degree of protection they enjoy while on State property through maintaining effective physical security and a visible deterrent to crime. VA Hospital Police Officers are available to Directors as the primary resource to fulfill this responsibility.

MP-1, Part I, §B11a(2).

APPENDIX C-4

(2) The size of a Police Section required by a station (beyond the prudent and minimum requirement for at least one qualified Hospital Police Officer on duty at all times) is determined by consideration of three basic factors:

(a) The size and physical dispersion of station facilities.

(b) Environmental crime conditions. The threat and incidence of crime varies with each locality. A stabilized high crime area will require the defensive deterrent of a larger Police Section.

(c) Total patient and employee population plus transient activity. The ideal ratio of on-duty police to population is approximately 1:500 varying with subparagraphs (a) and (b) above.

MP-1, Part I, §B11c(2).

APPENDIX C-5

(5) Hospital Police Officers will be assigned to vigorous and inquisitive patrol activity which will provide the greatest frequency of visibility in corridors, wards, stairwells and building perimeters. In addition, uniformed personnel will periodically patrol canteens, snack bars, recreational centers, and all areas open to patients and the public which are favored as meeting places for illegal drug and alcohol transactions.

(7) Hospital Police Officers will be specifically assigned the task of questioning occupants of vehicles parked on the station grounds during the hours of darkness and to direct the removal of any vehicle whose occupant cannot present a valid reason for his presence.

(9) Directors will determine a suitable hour for securing from outside entry all doors to the hospital which cannot be observed or included in a patrol.
MP-1, Part I, §B12a(5), (7), (9).

APPENDIX C-6

(1) The basic element of physical security is the well trained, active and inquiring Hospital Police Officer. Commercial security equipment may be selected and installed to assist in providing physical security and to economize on manpower. However, the pitfalls of false security are encountered when planning and equipment selecting are unsound.

(2) Equipment selected must provide either the active detection of crime in progress or passive prevention. A fence which channels persons to an observed entrance or exit or a high quality lock on a storage door are examples of passive prevention. A CCTV camera with a monitor, which provides an audible signal on camera detection of movement or an ultrasonic intrusion detection unit which triggers a local alarm, are examples of active detection systems. Conversely, a CCTV system visual-only monitor

provides false security since its effectiveness relies on the constant but low probability of screen observation by a human resource. Scanning CCTV cameras also provide low reliability as area security devices due to the hypnotic effect of screen monitoring and the extremely low probability of human attention to the screen. Door opening alarms are neither active detectors nor passive preventives and aside from advising that an unguarded door has been opened, such systems are unacceptable as security aids.

MP-1, Part I, §B12c(1) and (2).)

APPENDIX C-7

(4) During the course of the physical security survey, vulnerabilities will be judged considering the threats of crime from both external and internal sources. The most significant crimes for concern are physical assault, armed or strong-armed robbery, grand theft and burglary. The prevention of the opportunity for the commission of these serious crimes will be focused on during the survey. Hospital police patrol and operational procedures developed as a result of the survey will reflect due consideration for the possibility of all categories of crimes in proportion to their relative significance.

MP-1, Part I, §B12d(4).

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss.
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On August 19, 1980, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of two sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Solicitor General of the U.S.
Wade H. McCree, Jr.
Room 5413 Justice Dept. Bldg.
Washington, D.C. 20210

Andrea Sheridan Ordin
United States Attorney
1200 U.S. Courthouse
312 N. Spring Street
Los Angeles, CA 90012

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 19, 1980, at Santa Ana, California.

JACK GALLAGHER